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No. 95-1525

Supreme Court, U.S.
FILED
APR 22 1996

In The

Supreme Court of the United States

October Term, 1995

JAMES LEE FOSTER, Sheriff of Newberry County, CHARLES M. CONDON, Attorney General of South Carolina and JAMES W. JOHNSON, JR., Circuit Court Judge of South Carolina,

Petitioners,

vs.

DARRELL WAYLAND GILLIAM, JR., JAMES MATTHEW SWAIN and PAMELA OWINGS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

SAMUEL M. PRICE, JR.
Attorney for Respondent Pamela Owings
P.O. Drawer 836
Newberry, SC 29108
(803) 276-0796

JOY SCHERFFIUS GOODWIN
Counsel of Record
LEVY & GOODWIN
Attorneys for Respondent James Matthew Swain
1316 Richland Street
Columbia, SC 29201
(803) 256-4693

J. CHRISTOPHER MILLS
FAIREY, PARISE & MILLS, P.A.
Attorneys for Respondent Darrell Wayland Gilliam, Jr.
P.O. Box 8443
Columbia, SC 29202
(803) 252-7606

8719
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

33pp

QUESTIONS PRESENTED FOR REVIEW

1. Does the Double Jeopardy Clause protect the individual from a second trial after the trial court grants the state's mistrial motion, over the defendants' objections, for an evidentiary error which the district court and the Fourth Circuit found to be technical and harmless?

2. Does *Arizona v. Washington*, 434 U.S. 497 (1978), insulate the state trial judge's decision from appellate review if the error is caused by the defense?

3. Absent prosecutorial misconduct, does *Younger v. Harris*, 401 U.S. 37 (1971), preserve the federal court's inherent equitable authority to prevent a state court from violating an individual's constitutional right not to be twice placed in jeopardy?

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STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below

In an effort to keep this brief truly brief, respondents refer to the facts as set forth in the Fourth Circuit's *en banc* decision. 75 F.3d 881, 885-93 (4th Cir. 1996). (App. 4-23).

B. Correction of Misstatements in the Petition

Pursuant to United States Supreme Court Rule 15.2, respondents bring the following misstatements of facts and law contained in the petition to the Court's attention:

Petitioners allege the first trial was held "in December, 1991, but resulted in a mistrial, upon the prosecution's motion when the State trial judge determined that the defense counsel presented to the jury crime scene photographs when the particular photographs had not been introduced into evidence as required by State law and procedure. J.A. pp. 86-94. See also J.A. pp. 35-46. App. 264-270." (Petition 3). The first trial commenced on December 5, 1994, not 1991, and the trial judge did not make any determination at the time the mistrial motion was granted that defense counsel presented the photographs to the jury. (App. 264-270). Some five months later, on May 15, 1995, in a written order prepared by the prosecutor in response to respondents' double jeopardy motion, the trial judge stated, "[I]t is of no consequence whether the Defendants either inadvertently, intentionally or mistakenly allowed this activity to occur." (App. 258).

Petitioners represent that photographs "were reported as having been seen by the jurors," that jurors had looked at pictures (Petition 6) and that "[t]estimony was received from the jury foreman that all photographs had been circulated to the jury. J.A.

p. 92." (Petition 7). To the contrary, it was reported that photos which had not been admitted into evidence had been left on the jury box bar together with a stack of photos that were admitted into evidence. (App. 266-67). It is never clear whether the jury even viewed these photographs. (App. 11-12, 266-67).

It is not correct that "(t)he State court made a specific finding of prejudice to the government as a result of the defense counsel's actions and explained in detail why it rejected alternatives or a curative instruction. . . . " (Petition 7-8). The transcript of the hearing reflects that the only time the word "prejudice" was mentioned is when defense counsel stated that he failed to see any prejudice. (App. 265). In the subsequent order issued by the trial judge five months later, the only reference is to "this prejudicial occurrence" (App. 261), and later the court says this error may have come about as a result of actions of defense counsel. (App. 262). The court does not ever make a specific finding of prejudice to either side. As the district court observed, the order does not identify the prejudice except to say that the photographs were not in evidence. (App. 131).

The state trial court never considered and rejected the alternatives proposed by defense counsel (Petition 7) but summarily rejected them without explanation. (App. 264-70).

Petitioners assert that the district court found that it was defense counsel who caused the mix-up resulting in the photographs being exhibited to the jury. (Petition 16). What the district court actually found was that the state judge implicitly, if not explicitly, found that it was defense counsel, perhaps through innocent mistake, who erroneously placed the photographs on the jury rail, and that finding was entitled to a presumption of correctness under 28 U.S.C. § 2254(d). (App. 131).

The district court did not find that the mistrial motion was

invited by the state judge (Petition 16) but merely reflected that there was "testimony before this court which might suggest that the prosecutors made their motion out of a genuine belief that the trial court desired to receive such a motion. . . . " (App. 132).

Petitioners err when they cite to *Arizona v. Washington*, 434 U.S. 497 (1978), for the proposition that one claiming double jeopardy by reason of a second trial must show that there was no "manifest necessity" for the trial court to grant the State's mistrial motion (App. 21). To the contrary, *Arizona v. Washington* specifically holds:

> . . . [T]he prosecutor must shoulder the burden of justifying the mistrial if he is to avoid the double jeopardy bar. His burden is a heavy one. The prosecutor must demonstrate "manifest necessity" for any mistrial declared over the objection of the defendant.

Id. 434 at 505.

REASONS FOR DENYING THE WRIT

I.

THERE ARE NO COMPELLING REASONS FOR THIS COURT TO GRANT CERTIORARI.

None of the reasons set forth in Rule 10, Rules of the Supreme Court, exist in this case to justify the granting of a writ of certiorari. The State of South Carolina did not appeal the Fourth Circuit's grant of the stay,[1] nor did it ask the Fourth

1. *Gilliam v. Foster*, 61 F.3d 1070 (4th Cir., *en banc*, July 28, 1995). (App. 183).

Circuit to abstain from exercising jurisdiction or from granting the temporary relief requested. (App. 205). It now seeks, however, to raise the issue of abstention after losing on the merits of the habeas corpus petitions.

> Because the State did not rely upon the *Younger* abstention doctrine in opposing Petitioners' request for a temporary stay of the state criminal proceedings pending resolution of the merits of the § 2254 petition, we might be justified in refusing to consider this argument. *See Swisher v. Brady*, 438 U.S. 204, 213 n. 11 (1978) ("If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system.") (internal quotation marks omitted). Nevertheless, because the State advances the abstention argument now, and because the issue is one of considerable importance, we will address it.

(App. 49-50, n. 26.)

A. (1) There is not a conflict within the Circuit Courts of Appeals on issues raised in this appeal.

If there are extraordinary circumstances where the danger of irreparable loss is both great and immediate, and it is absolutely necessary for the protection of constitutional rights, federal courts have the power to enjoin states from instituting criminal action. *Ex parte Young*, 209 U.S. 123 (1908). Once the South Carolina Supreme Court refused to hear this appeal (App. 256), the respondents had "nowhere else to go to secure the benefits of the Fifth Amendment of the United States Constitution." (App. 248).

As to whether or not a double jeopardy claim falls within the "other extraordinary circumstances" exception of the *Younger*[2] abstention doctrine, the circuits are not split. As the Fourth Circuit found:

> Our conclusion is in accord with the decisions of the other courts of appeals that have addressed this question. They have **unanimously** recognized that a colorable claim that a second trial will violate a defendant's double jeopardy right is a preeminent example of one of the very few extraordinary circumstances justifying federal court intervention in a pending state criminal proceeding. *See Satter v. Leapley,* 977 F.2d 1259, 1261 (8th Cir. 1992); *Mannes v. Gillespie*, 967 F.2d 1310, 1312 (9th Cir. 1992), *cert. denied,* 113 S. Ct. 964 (1993); *Showery v. Samaniego,* 814 F.2d 200, 201 N.5 (5th Cir. 1987); *Doe v. Donovan,* 747 F.2d 42, 44 (1st Cir. 1984) (per curiam); *United States ex rel. Stevens v. Circuit Court of Milwaukee Co., Wis. Branch VIII,* 675 F.2d 946, 947-48 (7th Cir. 1982); *Gully v. Kunzman*, 592 F.2d 283, 286-87 (6th Cir.), *cert. denied,* 442 U.S. 924 (1979); *Drayton v. Hayes,* 589 F.2d 117, 120-21 (2d Cir. 1979); *United States ex rel. Webb v. Court of Common Pleas of Philadelphia County,* 516 F.2d 1034, 1037-39 (3d Cir. 1975).[3]

(Emphasis added).

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2. *Younger v. Harris*, 401 U.S. 37 (1971).

3. App. 52-53.

Petitioners allege a conflict in the circuits in the application of the *Arizona v. Washington* test. (Petition 25-30). They cite *Grooms v. Wainwright*, 610 F.2d 344 (5th Cir. 1980), *Cherry v. Director, State Bd. of Corrections*, 635 F.2d 414 (5th Cir. 1981); and *Abdi v. State of Georgia*, 744 F.2d 1500 (11th Cir. 1984) for this proposition. These cases, however, apply the same principles but reach different results by analyzing the particular nature of the trial error, who requested the mistrial, and the judicial response as revealed in the record.

> The words "manifest necessity" appropriately characterize the magnitude of the prosecutor's burden. For that reason Mr. Justice Story's classic formulation of the test has been quoted over and over again to provide guidance in the decision of a wide variety of cases. Nevertheless, those words do not describe a standard that can be applied mechanically or without attention to the particular problem confronting the trial judge.

Arizona v. Washington, 434 U.S. at 505. (Footnotes omitted).

(2) The Fourth Circuit has not decided an important federal question in a way that conflicts with a decision by a state court of last resort.

The Respondents appealed the state court's order denying the double jeopardy motion to the South Carolina Supreme Court, and the Court granted the state's motion to dismiss the appeal as interlocutory. (App. 256). The state had an opportunity to have this issue resolved by the South Carolina Supreme Court but asked that court not to hear the matter. Despite the court's interlocutory ruling, South Carolina case law is consistent with

federal law that the test for determining whether the mistrial was improvidently granted is whether "manifest necessity" demanded declaration of a mistrial. *State v. Kirby*, 236 S.E. 2d 33 (S.C. 1977); *State v. Prince*, 301 S.E. 2d 471 (S.C. 1983). "At all times, a defendant in a criminal case is entitled to the benefit of reasonable doubt." *State v. Bilton*, 153 S.E. 269, 277 (S.C. 1930). That constitutional principle of law applies to the determination of whether or not a mistrial was required under the test of manifest necessity. *Id.*

(3) The appealed decision has not departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court so as to call for an exercise of this Court's supervisory power.

A prosecutor is generally permitted only one opportunity to force a defendant to stand trial, and it is well settled constitutional law that the Double Jeopardy Clause of the Fifth Amendment protects an accused from a second trial as well as a second conviction. *Arizona v. Washington*, 434 U.S. at 503-05. In the instant case, "[t]he undisputed facts demonstrate that the state trial judge acted without any rational justification in granting a mistrial." (App. 185).

While the Fourth Circuit expressed its reluctance to temporarily enjoin an ongoing state criminal proceeding, it found:

> Of course, the temporary stay should have been granted days ago by the district court or by a panel of this court after hearing the arguments of counsel last Saturday, July 15, 1995. Because the district court and the panel erred in failing to issue a temporary stay, we must act in a manner that undeniably causes

> disruption in the state proceeding. But, the issuance of a stay is the **only means available to protect Petitioners' constitutional right**, and under the present circumstances, the vindication of Petitioners' basic constitutional right far outweighs the temporary suspension of the state proceeding.

(Emphasis added) (App. 184-85).

B. The South Carolina Supreme Court has not decided an important federal question in a way that conflicts with the decision of another state court or of a United States Court of Appeals.

This is not an appeal from a state court decision. It is an appeal from a federal writ of habeas corpus and does not conflict with any South Carolina Supreme Court opinion.

C. Neither a state court nor the Fourth Circuit has decided an important question of federal law which has not been, but should be, settled by the Supreme Court, nor has either decided a federal question in a way that conflicts with applicable decisions of the Supreme Court.

As hereinafter briefed, the opinion of the Fourth Circuit is well supported by long-standing double jeopardy law from this Court, and its decision does not conflict with decisions of the Supreme Court. *See Arizona v. Washington, supra*; *Abney v. United States*, 431 U.S. 651 (1977); *Illinois v. Somerville*, 410 U.S. 458 (1973); *United States v. Jorn*, 400 U.S. 470 (1971).

The errors Petitioners complain of are factual findings made by the district court and affirmed by the Fourth Circuit, *en banc*,

and the Fourth Circuit has not misapplied any rule of law. Petitioners are asking this Court to change longstanding double jeopardy law and find that the double jeopardy clause of the Fifth Amendment to the United States Constitution does not apply to state prosecutions, a position directly contrary to *Benton v. Maryland*, 395 U.S. 784, 794 (1969).

II.

THE FOURTH CIRCUIT CORRECTLY APPLIED *ARIZONA V. WASHINGTON.*

A. Petitioners misunderstand the criteria for applying the Double Jeopardy Clause where trial error precipitates the declaration of a mistrial.

Petitioners argue this Court should summarily reverse the Court of Appeals because the concerns of the Double Jeopardy Clause do not come into play where defense counsel's neglect causes a mistrial and there is no suggestion of prosecutorial misconduct or judicial overreaching. (Petition 22). This statement reflects the state's misunderstanding of the underlying principles of the Double Jeopardy Clause, and this Court's analysis of when a mistrial is justified by manifest necessity. The combination of defense error and lack of governmental overreaching are not the sole criteria for determining the applicability of the Double Jeopardy Clause when a trial error results in a mistrial. In fact both these factors have been considered by this Court and rejected.

> . . . [W]e cannot evolve rules based on the source of the particular problem giving rise to a question whether a mistrial should or should not be declared, because, even in circumstances where the problem reflects

> error on the part of one counsel or the other, the trial judge must still take care to assure himself that the situation warrants action on his part foreclosing the defendant from a potentially favorable judgment by the tribunal.

Jorn, 400 U.S. at 486.

> If that right to go to a particular tribunal is valued, it is because, independent of the threat of bad faith conduct by the judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury . . .

Id., cited with approval in *Arizona*, 434 U.S. at 509, n. 25.

The Double Jeopardy Clause is designed to protect against governmental overreaching. Its chief purpose lies in the right of the individual not to be subject to multiple trials absent some exception to the plain prohibition against a second prosecution.

> The reasons why this "valued right" merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is

> completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

(Footnotes omitted). *Arizona*, 434 U.S. at 504-05.

B. The proper test for granting a mistrial over the defendants' objection is whether manifest necessity existed for the grant of the mistrial or if the failure to grant a mistrial would defeat the ends of justice.

(1) ***Manifest Necessity.***

Contrary to Petitioners' assertion that the appellate court "ignored the principles underlying the concept of manifest necessity" (Petition 22), the court painstakingly applied the factors used to evaluate the necessity of a mistrial and the deference owed the trial court's decision.

The Fourth Circuit scrupulously honored *Arizona v. Washington* in determining that manifest necessity did not require the mistrial.

Applying *Arizona*, the appeals court recognized "the decision of the trial judge is accorded special respect." "This level of deference falls on a spectrum between the strictest appellate scrutiny that applies when a trial judge grants a mistrial in order to permit the prosecution an opportunity to garner more evidence against the accused and the highest level of appellate deference that applies when a trial judge dismisses a hopelessly deadlocked jury." (App. 26).

The intentional professional misconduct which led to a mistrial in *Arizona* compelled this court to give great deference

to the trial court's decision. The harmless nature of the error caused by the "unintentional neglect" of one defense counsel[4] in this case cannot be rationally equated with misconduct in Arizona, and the review need not be identical. "The deference owed to the decision of the trial judge to grant a mistrial, although great, is not unlimited." (App. 26). As recognized in *Arizona*, the "spectrum of trial problems" will "vary in their amenability to appellate scrutiny." *Id.*, 434 U.S. at 510. Under Petitioners' theory, the state court is entitled to absolute deference and there would be no review.

> Moreover, if the circumstances surrounding the grant of this mistrial could be found to sustain a determination that the state trial judge exercised sound discretion in granting a mistrial, there would be little point to providing any level of judicial review of such decisions. For better or worse, however, the Double Jeopardy Clause has been construed by the Supreme Court to permit the retrial of a defendant after a mistrial is granted over his objection only when manifest necessity or the ends of public justice compelled that the mistrial be granted, and the Supreme Court has directed reviewing courts to examine the ruling of the trial judge to determine whether sound discretion was exercised in granting the mistrial. Were we to hold otherwise, the protection afforded by the Double Jeopardy

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4. As noted by the Fourth Circuit, "[t]he State's argument is particularly unconvincing on the present facts because there has never been any allegation that all of the defense attorneys were responsible for the error. Thus, the Petitioners whose separate counsel were not responsible for the error were deprived of a constitutional right in the absence of even unintentional harmless error by their own attorney." (App. 42-43).

> Clause would no longer safeguard a defendant's right to have a trial completed by an empaneled jury — a right long held to be encompassed within the protections afforded by the Clause — but would provide protection only against demonstrable prosecutorial or judicial misconduct. Further, the review for sound discretion reaffirmed in *Arizona v. Washington* would be relegated to a ministerial rubber stamp of a state trial judge's decision to grant a mistrial irrespective of the irrationality of that decision.

(App. 48-49).

Petitioners incorrectly argue that the appellate court "substituted its judgment for that of the trial court." (Petition 21.)

> We are not called upon to second guess a discretionary ruling on the admissibility of evidence by a state trial judge in a criminal proceeding or a finding that the jury was potentially biased or prejudiced. The state trial judge plainly refused to rule on the admissibility of the Set 1 photographs and made no finding that the impartiality of the jury had been, or may have been, affected by viewing the photographs in dispute. Nor are we faced with a situation in which the admissibility of evidence is subject to some doubt.

(App. 47-48).

The inadmissible and prejudicial comments by defense counsel in *Arizona* allowed this Court to " . . . start from the premise that defense counsel's comment was improper and may have affected the impartiality of the jury." *Id.* at 511. In contrast, the critical elements of prejudice or potential juror bias are missing herein. "[N]either the prosecution nor the state trial judge indicated that the photographs were in any way prejudicial to the prosecution or the defense." (App. 12). In fact, the stated motivation of the prosecutors to move for the mistrial was their concern for the integrity of the evidentiary process .[5]

Prosecutors, like the trial court, " . . . never evinced any awareness that the grant of a mistrial might implicate or deprive the Petitioners of their constitutional right to have the empaneled jury decide their guilt." (App. 44). It was this total lack of concern for the defendants' "valued right" to have this "particular tribunal" decide their fate which led the prosecutors to move and the trial court to act precipitately in granting the mistrial.

> First, as the district court found, the state trial judge acted precipitately: He refused defense counsel's request to determine whether the jury had actually seen the photographs in question; he refused to determine whether

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5. According to the testimony of two prosecutors who testified at the habeas hearing below, the decision to move for the mistrial was apparently prompted by their perception that the trial judge signaled for a motion (App. 132), by a concern for the integrity of the court process, and fear that the rules of evidence were being circumvented. It was not because of any perceived inadmissibility of the photographs. (J.A. 386.) The state before the *en banc* panel maintained this position. "The State asserted at oral argument that even if the photographs in Set 1 had been exact duplicates of the photographs that had already been admitted into evidence, the state trial judge would have been justified in concluding that a mistrial was manifestly necessary." (App. 42).

Officer Counts had in fact authenticated the photographs during his testimony; he refused simply to look at the photographs and rule on their admissibility; and he refused to allow defense counsel's request to recall Officer Counts and formally move the admission of the photographs into evidence. The manner in which the state trial judge examined the appropriateness of the grant of a mistrial furnishes no indication of the exercise of sound discretion.

* * *

Finally, the state trial judge ignored an obvious and adequate alternative to the grant of a mistrial. *See United States v. Sloan*, 36 F.3d 400 & n. 11 (4th Cir. 1994); *United States v. Shafer*, 987 F.2d 1054, 1057 (4th Cir. 1993) ("If alternatives existed, then society's interest in fair trials designed to end in just judgments was not in conflict with the defendant's right to have the case submitted to the jury.") (internal quotation marks & citation omitted); *Harris*, 607 F.2d at 1085 n. 4 ("If obvious and adequate alternatives to aborting the trial were disregarded, this suggests the trial judge acted unjustifiably.").

(App. 44-45).

(2) *The ends of public justice did not require the grant of the mistrial.*

As summarized by Judge Wilkins, the case reduced to its core presents the following question: "Does a trial judge exercise sound discretion in concluding that a mistrial is supported by the ends of justice when defense counsel negligently permits the jury to view photographs that have not been admitted into evidence, but that undoubtedly could and would be admitted if so offered?" (App. 39).

The public interest in seeing that a criminal prosecution proceed to verdict is obviously present in every case, and placing it in the balance cannot alter the result of the analysis . . . it is a constant whose importance a judge must consider when weighing other factors. *Illinois v. Somerville, supra*, 410 U.S. at 458-59, J. Marshall, dissenting.

(a) Since the error was technical and harmless it would not have caused the case to be reversed on appeal.

> A trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached, or if a verdict of conviction could be reached but would be reversed on appeal due to an obvious procedural error in the trial. If an error would make reversal on appeal a certainty, it would not serve "the ends of justice" to require that the Government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court.

Somerville, 410 U.S. at 464. (App. 35-40).

> . . . [B]ecause these photographs could have been admitted into evidence, could not have caused the jury to be confused or misled, and could not have biased or inflamed the jury, there is no basis upon which to conclude that the jury could not have reached an impartial verdict.

(App. 40). Judge Wilkins explains in definitive terms why the error could not cause reversal on appeal under South Carolina law:

> [A]ny error in the jury's viewing of these photographs would not have amounted to reversible error under South Carolina law. First, because there was no reason why the photographs could not have been formally admitted by the defense, any technical error in the jury's viewing of the photographs could have been easily remedied before the case was submitted to the jury. Second, even if the technical error could not have been corrected, this error could not possibly have resulted in reversal of Petitioners' convictions because harmless error does not necessitate the reversal of a South Carolina criminal conviction. *See State v. Gaskins*, 326 S.E. 2d 132, 141 (S.C. 1985), *cert. denied*, 471 U.S. 1120 (1985). The erroneous consideration of evidence is not a ground for reversal unless it results in prejudice. *See State v. Knight*, 189 S.E. 2d 1 (S.C. 1972). And, when a jury considers a crime scene photograph, when other photographs of the same scene are already in evidence without

> objection, no prejudice can be inferred. *See State v. Bellue,* 194 S.E. 2d 193, 194 (S.C. 1973). Moreover, a jury's exposure to evidence that is admissible, but not admitted, does not require reversal of a conviction. *See Campbell,* 191 S.E. 2d at 772-73 (stating that display before the jury by the solicitor of an axe found at the crime scene did not warrant reversal of defendant's conviction, when although not admitted into evidence, the axe properly could have been admitted). Thus, there is no possibility that if the trial had resulted in a conviction of Petitioners, the verdicts would have been reversed on appeal because the jury viewed the Set 1 photographs.

(App. 40-41).

Petitioners cannot cite to a single South Carolina decision which conflicts with the Fourth Circuit's recitation of South Carolina law. Indeed, this is why the state's attorney conceded, as he must, that there is no reason why these photographs are not relevant evidence and properly admissible if offered by either the state or the defense. (App. 17-18).

> . . . . In response to the repeated questions by various members of the en bane court during oral argument to the State's attorney concerning how the prosecution's case had been prejudiced by the jury's viewing of the Set 1 photographs, the State acknowledged that it previously had conceded that the photographs themselves were not prejudicial and maintained on at least six separate

> occasions that any prejudice to the prosecution resulted from the fact that the jury saw the Set 1 photographs before they were properly authenticated and formally admitted into evidence. . . .

(App. 32-33, n. 19).

(b) The threat to the integrity of the judicial system and the threat of encouraging defense attorney misconduct are unfounded.

Petitioners claim state trial judges will now be hesitant to gain control of their courtrooms or to grant mistrials because of fear that reprosecution will be barred. Instead, they will opt for tainted proceedings rather than no proceedings at all. Further it will encourage unethical attorneys to push the bounds of advocacy to gain an unfair advantage to which the state will have no remedy. (Petition 23). This fear is totally misplaced.

> A trial judge must be permitted to ensure the integrity of the trial and its evidentiary procedures through the grant of a mistrial, the State maintains, and any rule that fails to recognize this institutional necessity would place unscrupulous defense counsel in a "no lose" situation: Unethical defense counsel will be undaunted from violating evidentiary procedures because, in the event a mistrial is granted, they obtain a real opportunity for a reviewing court to conclude that retrial is barred by the Double Jeopardy Clause or, in the event the trial judge does not grant a mistrial, they obtain the benefit of having the jury consider unadmitted or improperly

> admitted evidence. This parade of horribles rings hollow.

(App. 41-42).

> . . . . [I]f counsel seeks to improperly place only innocuous, admissible evidence before the jury, no advantage is gained, and a significant risk exists that counsel may find that they face sanctions for their conduct. All in all, we do not view this scenario as creating any real possibility for abuse.

(App. 43).

Conversely, this decision protects both the state and the defendant by insuring that trial errors that do not cause any prejudice to the state or cause potential juror bias are not grounds for a mistrial, and that the state and the defense are afforded an opportunity to have one complete trial with a jury that when selected was determined to be fair to both parties.

Finally, the state makes an emotional appeal that if this Court prevents reprosecution, "NO JURY WILL EVER DETERMINE THE PROPRIETY O[F] THE CHARGES." (Petition 20, emphasis in original). While this result is true and does exact some level of societal cost, as it does in every double jeopardy application, the result to the state is not unjust. The state made the decision to prevent an unbiased jury from determining the propriety of the charges when it decided to move for an unjustified mistrial.

Petitioners are asking this Court to rule that absent the prosecutor or the trial judge causing the error for which the

mistrial was granted, any error by the defendant, regardless of its prejudice to the state or effect on the impartiality of the jury, is appropriate grounds for a mistrial and is unreviewable by an appellate court. This would reduce the protection from being subjected to multiple prosecutions to the subjective opinion of the prosecutor and trial judge. Whether that subjective view is motivated in good faith or bad faith would be left to the prosecutor or judge to decide. Without the objective manifest necessity apparent in the record, a defendant's right not to be placed in jeopardy twice is a hollow promise. It is for this reason the *Arizona* court required that the basis of the mistrial be articulated by the trial judge and be apparent from the record at the time the mistrial was declared. Only by retaining the objective criteria for declaring a mistrial are the rights of the state and the defendant protected.

III.

ABSENT PROSECUTORIAL MISCONDUCT, DOES *YOUNGER V. HARRIS* PRESERVE THE FEDERAL COURT'S INHERENT EQUITABLE AUTHORITY TO PREVENT A STATE COURT FROM VIOLATING AN INDIVIDUAL'S RIGHT NOT TO BE TWICE PLACED IN JEOPARDY?

In *Younger v. Harris* the Supreme Court held that federal courts should not interfere in pending state criminal proceedings absent a showing of "bad faith, harassment **or any other unusual circumstances that would call for equitable relief.**" *Id.* 401 U.S. at 54. (Emphasis added). Bad faith or harassment by the state prosecutors are not issues before this Court. The sole issue is the definition and application of "any other unusual circumstances that would call for equitable relief." Judge Wilkins, writing for the majority, stated:

> Nevertheless, a federal court may provide equitable intervention in a state criminal proceeding " 'even in the absence of the usual prerequisites of bad faith and harassment' " when " 'extraordinary circumstances in which the necessary irreparable injury can be shown' " are present.

Kugler, 421 U.S. at 124 (quoting *Younger*, 401 U.S. at 53). (App. 51). The decision continued:

> The policy of equitable restraint expressed in *Younger v. Harris* . . . is founded on the premise that ordinarily a pending state prosecution provides the accused a fair and sufficient opportunity for vindication of federal constitutional rights. *Id.* However, because the Double Jeopardy Clause of the Fifth Amendment protects not only against multiple convictions but also "against being twice put to *trial* for the same offense," *Abney v. United States*, 431 U.S. 651, 660-62 (1977), a portion of the constitutional protection it affords would be irreparably lost if Petitioners were forced to endure the second trial before seeking to vindicate their constitutional rights at the federal level;[27] *see Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 303 (1984); *Abney*, 431 U.S. at 662. Thus, the irreparable deprivation of this Fifth

27. Obviously, Petitioners already had been required to defend themselves in one criminal proceeding, and it was their second criminal trial from which they sought federal habeas relief.

> Amendment Double Jeopardy right is an extraordinary circumstance warranting federal court equitable intervention in Petitioners' state criminal proceeding.

(App. 51-52).

Petitioners argue that the majority decision will create "a new duty to intervene in ongoing state court prosecutions even when defense counsel's error caused the declaration of the mistrial." (Petition 23). The majority opinion creates no new duty. It simply reaffirms the standard constitutional Fifth Amendment Double Jeopardy protection. This double jeopardy right not to be twice tried for the same crime has been recognized in each of the circuits in which the issue has been raised. [*See* cases cited in 1.A.(1), *supra*, p. 5.] No new duty to intervene has been created by the majority decision, and it is a stretch of the imagination to so allege.

Petitioners further argue, "The *en banc* court creates a new broad exception to the *Younger* abstention whenever a petitioner on habeas corpus raises a double jeopardy claim." (Petition 24). No new broad exception is created by the majority decision. *Perez v. Ledesma,* 401 U.S. 82, 85 (1971), provided, "Only in cases of proven harassment or prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction and perhaps in other extraordinary circumstances where irreparable injury can be shown is federal relief against pending state prosecutions appropriate." Thus, there are three types of cases in which the abstention doctrine does not apply:

1. Proven harassment;

2. Prosecutions undertaken by state officials in bad faith without hope of obtaining a valid conviction; and

> 3. Other extraordinary circumstances where irreparable injury can be shown.

The third exception applies to this case. In the majority opinion, Judge Wilkins stated:

> Moreover, this conclusion is buttressed by the fact that the Supreme Court has never refused on the basis of the Younger abstention doctrine to decide the merits of a double jeopardy claim raised in a § 2254 petition. Instead, the Supreme Court has on several occasions addressed whether a forthcoming second state criminal trial was barred on double jeopardy grounds. *See Lydon*, 466 U.S. at 304-13; *Arizona v. Washington*, 434 U.S. at 503-17.

(App. 53).

Equitable federal interference with an ongoing-criminal prosecution in the Court of General Sessions of the State of South Carolina should be taken only in the most limited and narrow circumstances. This case falls within the definition of limited and narrow circumstances. The facts of this case fall squarely within what was contemplated by *Younger* as " . . . other unusual circumstances that would call for equitable relief."

The Court of Appeals has not misinterpreted the role of the federal courts under the doctrine of *Younger v. Harris*. The Court has not undermined principles of comity and federalism by its staying further criminal prosecutions of these respondents. The court has simply applied the long standing constitutional right of each defendant "against being twice put to trial for the same offense." *Abney*, 431 U.S. at 660-62.

CONCLUSION

Assuming, *arguendo*, that the second trial of these defendants had not been stayed and the case had concluded to a conviction of these individuals, we would be back before the Court in the same posture this case is in now: that is, an appeal on the merits of the double jeopardy claim. Unquestionably, the district court would have made the same ruling and granted the writ, and the Fourth Circuit would have affirmed.

If this Court were to ultimately reverse the Fourth Circuit's *en banc* decision, does the state wish to resume its trial of these defendants at the stage it was recessed in July, 1995? After four days of trial, the state had rested and the defense was preparing to call its first witness when the proceedings were stayed. What if one defendant wishes to proceed with the same jury, one wishes a new jury, and one takes no position? Are new double jeopardy issues implicated?

The petition for writ of certiorari should be denied.

Respectfully submitted,

JOY SCHERFFIUS GOODWIN
Counsel of Record
LEVY & GOODWIN
Attorneys for Respondent
James Matthew Swain
1316 Richland Street
Columbia, SC 29201
(803) 256-4693

J. CHRISTOPHER MILLS
FAIREY, PARISE & MILLS, P.A.
Attorneys for Respondent
Darrell Wayland Gilliam, Jr.
P.O. Box 8443
Columbia, SC 29202
(803) 252-7606

SAMUEL M. PRICE, JR.
Attorney for Respondent
Pamela Owings
Post Office Drawer 836
Newberry, SC 29108
(803) 276-0796